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IN THE

Supreme Court of the United States

October Term, 1991

LOCAL UNION NUMBER 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

WICKHAM CONTRACTING CO., INC. and RALPH PERONE, as a Joint Venture,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. May a district court award prejudgment interest, in a damage suit by a person injured by reason of a labor organization's unfair labor practice, even though Congress in the applicable statute did not authorize awards of prejudgment interest and even though the damages were not ascertainable prior to the trial?

2. In a damage suit brought under federal law and tried by a jury, when the award of prejudgment interest rests in discretion, must the issue of prejudgment interest be submitted to the jury?

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In The

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LOCAL UNION NUMBER 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

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- against -

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1. The Petitioner and the Respondents are all the parties to the proceeding in the Court below.

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit is officially reported at 955 F.2d 832 and appears in the Appendix. It affirmed the judgment of the U. S. District Court for the Southern District of New York (Mukasey, J.), which appears in the appendix. This judgment, inter alia, awarded the plaintiffs prejudgment interest in the amount of $50,905. The Second Circuit affirmed and held that the district court after a jury trial may award prejudgment interest in an action brought under §303 of the Labor-Management Relations Act.

JURISDICTION

This judgment of the Court of Appeals

for the Second Circuit was entered on January 29, 1992. This petition for certiorari was filed within ninety days of that date. The Court's jurisdiction is invoked under 62 Stat. 928, 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes involved are 29 U.S.C. §187 and 28 U.S.C. §1961, the pertinent texts of which are set forth in the Appendix.

STATEMENT OF THE CASE

During the week of July 8, 1974, defendant Local 3, International Brotherhood of Electrical Workers ("Local 3") called a strike against its members' employers who were performing electrical contracts for the Board of Education of the City of New York. A goal of the strike was to forcd the Board of Education to cease doing business with the plaintiffs, whose employees were represen-

ted by the Teamsters. On July 22, 1974, the Board of Education issued stop orders to the plaintiffs which halted their work on two contracts whose prices totalled $406,000. On August 6, 1974, the Board of Education rescinded its stop orders and the plaintiffs were then free to resume performing those contracts.

On July 29, 1974, the plaintiffs commenced a lawsuit for damages under §303 of the Labor-Management Relations Act ("LMRA"). In 1974 the NLRB after a hearing found that Local 3 had engaged in an unfair labor practice prohibited by §8(b)(4) of the LMRA and issued a cease and desist order. In 1976, the Second Circuit upheld the NLRB's determination and order.

At the first trial of the civil suit,

pursuant to the instructions of the district court, the jury adopted the NLRB's finding that Local 3 had engaged in an unfair labor practice under §8(b)(4), and the jury awarded $959,000 under §303. The Second Circuit affirmed the jury's finding of liability, but remanded the case for a new trial on the damages. See Wickham Contracting Co. v. Board of Education, 715 F.2d 21 (2d Cir. 1983).

The second damage trial was not held until April 1991. After the jury returned an award of $41,000, the district court asserted that it had discretion to award prejudgment interest, and the court awarded prejudgment interest on the award, accruing from September 1, 1975, which amounted to $50,905, for a total award of $91,905.

Local 3 appealed from the award of

prejudgment interest and argued as follows:

1. The district court lacked jurisdiction to award prejudgment interest because Congress did not grant such jurisdiction to the district court and because the amount of the plaintiff's damages was not ascertainable prior to the jury's verdict.

2. If the district court did have jurisdiction the court should not have awarded prejudgment interest because the delays between 1974 and 1989 were exclusively the fault of Wickham's attorneys, and because Wickham's damages attributable to the two-week stop order were speculative. When Congress amended the Sherman Act in 1979 to confer jurisdiction upon district courts to award prejudgment interest, Congress provided that the district courts must first find that delays in the litigation

process were caused by the attorney for the defendant.

3. Whenever the award of interest in a jury trial rests in discretion, it is the jury which must exercise it.

The Second Circuit discussed and rejected Local 3's first two arguments, and the court did not discuss Local 3's argument that if the district court had jurisdiction to award prejudgment interest it should have submitted that issue to the jury.

REASONS FOR GRANTING THE WRIT

1. The decision by the Second Circuit conflicts with this Court's recent teaching limiting the jurisdiction of district courts to award prejudgment interest when Congress did not authorize such awards, and conflicts

with an applicable decision of the Eighth Circuit.

The numerous awards of damages against labor unions awarded since Section 303 was enacted in 1947 rarely included prejudgment interest.

In this Court's only decision interpreting the damage provision of Section 303, this Court held that punitive damages which the applicable state law permitted may not be awarded, because Congressional judgment provided that tort-based recovery for an employer's business loss "should be limited to actual, compensatory damages." Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton, 377 U.S. 252, 260-61 (1964).

Only two other appellate courts have discussed the question of whether Section 303 authorized the award of prejudgment in-

terest. The Eighth Circuit held that prejudgment interest may not be awarded, because in Section 303 cases damages are by definition unliquidated, in that they cannot be ascertained prior to judgment. Noranda Aluminum, Inc. v. United Brotherhood of Carpenters, etc., et al., 8th Cir. 1976, 528 F. 2d 1304, 1310. This decision creates an actual conflict between the Eighth Circuit and the Second Circuit.

In the only other discussion by an appellate court of prejudgment interest in suits under Section 303, the Third Circuit noted that while prejudgment interest had been awarded by the court below because the union had been unjustly enriched, the union in fact had not been unjustly enriched at the plaintiff's expense, and the court reversed the interest award. Feather v.

United Mine Workers of Am., 711 F.2d 530, 540-41 (3d Cir. 1983).

Many of the defendants who are exposed to the possibility of awards of prejudgment interest are employers who are sued for damages by their employees. In 1988 this court issued two decisions involving lawsuits by employees against their employers. In one of these decisions this court stated that prejudgment interest should not be awarded when Congrss did not intend to authorize awards of prejudgment interest. Monessen Southwestern Railway Co. v. Morgan, 486 U.S. 330, 336-339 (1988). In the other decision this court stated that even when Congress made interest awards mandatory such awards may be "problematic" when the damages are un-liquidated. Laborers Health and Welfare Trust Fund v. Advance Lightweight Concrete Co., Inc., 1988, 484 U.S. 593, 127 LRRM 2657

2551.

In Monessen this court held that prejudgment interest awards under the Federal Employers Liability Act ("FELA") were contrary to the intent of Congress because Congress had never amended FELA explicitly to authorize awards of prejudgment interest. When the Labor-Management Relations Act was amended in 1959, Congress did not amend Section 303 to authorize awards of prejudgment interest. Congress did amend the Sherman Act in 1979 for the sole purpose of authorizing awards of prejudgment interest in limited instances. Sherman Antitrust Act, 15 USC §15a and §15(a).

In Laborers Health and Welfare Trust Fund, in an action brought under ERISA this court in pertinent part stated:

> The special remedy against employers who are delinquent in meeting their contractual obligations that is created by §502(g)(2) includes a mandatory award of prejudgment interest....
>
> .....
>
> Whereas it is entirely appropriate to award prejudgment interest.... as a remedy for an employer's failure to make the payments specified in a contract, those remedies are problematic in cases in which there is a good faith dispute over both the existence and the extent of the employer's liability.

This Court did not here state whether it would approve the award of prejudgment interest when there is not a good faith dispute over the existence of some liability but there is a good faith dispute over the extent of that liability.

In lawsuits under ERISA and under other statutes pursuant to which damages are based on employees' wages, approximate estimates can readily be made even when

the damages are not precisely ascertainable prior to the trial. Thus, prejudgment interest is routinely added to the "liquidated damages" required to be awarded pursuant to the Fair Labor Standards Act, 29 U.S.C. §216(c), and interest is added to the awards of up to two years of back wages recoverable under Section 706(g) of the Civil Rights Act of 1964.

Awards of damages caused by strikes or picketing, on the other hand, rarely can be estimated before the awards have been made, as is beautifully illustrated by the history of the instant lawsuit.

A grant of certiorari will give this Court an opportunity to clarify its teaching with respect to the role of Congress in determining what types of damages may be awarded in civil suits, at least in the area of prejudgment interest.

If the Second Circuit's decision remains in effect, that decision probably will be used to weaken the barriers against the overly frequent awards of prejudgment interest, as this court recognized in Monessen and in Laborers Health and Welfare Trust Fund, supra.

2. The decision by the Second Circuit deprives litigants of their right, which is recognized by all four circuits which discussed this question, that in jury trials when the award of prejudgment interest rests in discretion, the issue of prejudgment interest should be submitted to the jury.

The Second Circuit and three other circuits have considered the question of whether when an award of interest under federal law rests in discretion, the issue of prejudgment interest in a jury case

must be submitted to the jury. All four Circuits held that when the award of interest rests in discretion it is the jury which must exercise it. Furtado v. Bishop, 604 F.2d 80, 98 (1st Cir. 1979); Hertz v. Graham, 292 F.2d 443, 449 (2d Cir. 1961), cert. den. 368 U.S. 929; Newburgh Land & Dock Co. v. Texas Co., 227 F.2d 732, 735 (2d Cir. 1955); Havis v. Petroleum Helicopters, Inc., 664 F.2d 54, 55 (5th Cir. 1981); Petersen v. Chesapeake & Ohio Railway Co., 784 F.2d 732, 740 (6th Cir. 1986).

In the instant case the District Court did not submit the issue of interest to the jury. The Second Circuit did not discuss this issue which Local 3 presented to it, but stated: "We have carefully considered the Union's remaining arguments, and find them to be without merit".

The district courts should not be permitted to remove from juries their function of fixing the damages in civil suits.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 482—August Term, 1991

(Argued November 6, 1991 Decided January 29, 1992)

Docket No. 91-7713

WICKHAM CONTRACTING CO., INC.; RALPH PERONE,

Plaintiffs-Appellees,

—against—

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Defendant-Appellant.

Before:

CARDAMONE, PIERCE and MINER,

Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York (Mukasey, *J.*) awarding prejudgment interest on damages recovered by

employer under Section 303(b) of the Labor Management Relations Act for union secondary strike.

Affirmed.

NORMAN ROTHFELD, New York, NY, *for Defendant-Appellant.*

JOSEPH E. GULMI, New York, NY (Allan J. Parker, Shea & Gould, New York, NY, of counsel), *for Plaintiffs-Appellees.*

MINER, *Circuit Judge*:

Defendant-appellant Local No. 3 of the International Brotherhood of Electrical Workers ("union") appeals from a judgment of the United States District Court for the Southern District of New York (Mukasey, *J.*) awarding prejudgment interest on damages recovered by plaintiffs-appellees Wickham Contracting Co. and Ralph Perone (collectively, "Wickham"), as employers and former joint-venture partners. The damages were awarded under Section 303(b) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141–97, which provides a civil remedy to employers sustaining damages from secondary strike activity by a labor organization. *See* 29 U.S.C. § 187.

The union contends that prejudgment interest is inappropriate in Section 303 cases because the LMRA, being silent on the subject of prejudgment interest, provides no "statutory authority" for such awards, and because the

damages involved are unliquidated, or difficult to ascertain prior to judgment. The union further contends that, even if prejudgment interest may be awarded under Section 303, the district court erred in awarding interest in this particular case. We have not previously addressed the question of prejudgment interest under this provision of the LMRA. For the reasons that follow, we hold that an award of prejudgment interest under Section 303 is within the sound discretion of a district court, and that Judge Mukasey did not abuse his discretion in awarding interest in this case.

BACKGROUND

The union represents electricians who are employed by contractors to perform electrical construction work. Wickham was an electrical contractor. In early 1974, Wickham entered into contracts with the Board of Education of the City of New York under which Wickham was to perform electrical modernization and construction work at three New York City public schools, P.S. 8, P.S. 41, and the Tremont Early Childhood Center. Wickham's electricians were represented by Teamsters Local 363.

During the week of July 8, 1974, while Wickham's work on the schools was under way, the union caused its members to strike against all electrical contractors performing work for the Board of Education. The immediate goal of the strike was to force the Board of Education to cease doing business with Wickham. The ultimate goal of the strike was to oust the Teamsters from their position as representative of Wickham's electricians.

On July 22, 1974, the Board of Education issued stop work orders to every electrical contractor that did not

have a collective bargaining agreement with the union, including Wickham. Wickham's work on the schools came to an immediate halt. Wickham commenced this civil suit against the union under Section 303(b) of the LMRA on July 29, 1974. At the same time, Wickham filed unfair labor practice charges with the NLRB.

The Board of Education rescinded its stop orders on August 6, 1974, although the union's walkout apparently continued until September 13, 1974, when a temporary restraining order was issued against the strike by the United States District Court for the Eastern District of New York. On September 19, 1974, the union lost a representation election to the Teamsters, and the NLRB certified the Teamsters as the bargaining representative of Wickham's electricians the following month.

On September 26, 1975, the NLRB found that the union had engaged in an unfair labor practice under Section 8(b)(4) of the National Labor Relations Act ("NLRA"), and issued a cease and desist order. The NLRB's determination and order were upheld by this Court the following year. *See NLRB v. Local 3, Int'l Bhd. of Elect. Workers*, 542 F.2d 860 (2d Cir. 1976) ("*Wickham I*"). In the civil suit commenced by Wickham, a jury eventually found the union liable in 1982, and awarded $959,000 in damages under Section 303. We affirmed the jury's finding of liability, but remanded the case for a new trial on the amount of damages. *See Wickham Contracting Co. v. Board of Educ.*, 715 F.2d 21 (2d Cir. 1983) ("*Wickham II*").

The new damages trial was not held until April 1991. The jury returned an award of $41,000. At Wickham's request, Judge Mukasey awarded prejudgment interest on this amount accruing from September 1, 1975. The inter-

est component amounted to $50,905, for a total award to Wickham of $91,905.

DISCUSSION

Section 303(a) of the LMRA makes it unlawful for a labor organization to engage in conduct defined as an "unfair labor practice" in Section 8(b)(4) of the NLRA. *See* 29 U.S.C. § 187(a). Section 8(b)(4) of the NLRA makes it an "unfair labor practice" for a labor organization to engage in, or to induce any individual to engage in, a strike, where an object thereof is to force any person to cease doing business with any other person or to force an employer to recognize or bargain with a labor organization not certified as the representative of the employer's employees. *See* 29 U.S.C. § 158(b)(4)(i)(B). Section 303(b) of the LMRA provides that any person injured in "his business or property" by virtue of a Section 303(a) violation "shall recover the damages by him sustained and the cost of the suit." *See* 29 U.S.C. § 187(b). The LMRA is silent on the subject of prejudgment interest.

I. The Law of Prejudgment Interest

Since the early part of this century, the United States Supreme Court has stated repeatedly that discretionary awards of prejudgment interest are permissible under federal law in certain circumstances. Under the Court's analysis, the award should be a function of (i) the need to fully compensate the wronged party for actual damages suffered, (ii) considerations of fairness and the relative equities of the award, (iii) the remedial purpose of the statute involved, and/or (iv) such other general principles as are deemed relevant by the court. *See Loeffler v. Frank*, 486 U.S. 549, 557-58 (1988); *Blau v. Lehman*, 368 U.S.

403, 414 (1962); *Rodgers v. United States*, 332 U.S. 371, 373-74 (1947); *Board of County Comm'rs of the County of Jackson v. United States*, 308 U.S. 343, 352 (1939); *Miller v. Robertson*, 266 U.S. 243, 257-58 (1924).

On the basis of one or more of these enumerated considerations, the Court has allowed recovery of prejudgment interest under a variety of federal laws, despite the silence of the laws on the subject of interest. *See, e.g., Loeffler*, 486 U.S. at 557-58 (suit for back pay under Title VII); *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933) (suit under takings clause of Fifth Amendment; interest viewed as part of "just compensation"); *Waite v. United States*, 282 U.S. 508, 509 (1931) (patent law infringement suit; interest viewed as part of "entire compensation" to which statute referred); *Miller*, 266 U.S. at 250, 258 (contract suit under Trading With the Enemy Act); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 302, 304-06 (1923) (suit for taking of property under the Lever Act; interest viewed as part of "just compensation" to which statute referred); *Billings v. United States*, 232 U.S. 261, 284-88 (1914) (suit to recover federal excise taxes paid).

The Court has, however, disallowed prejudgment interest awards in certain instances. Prejudgment interest may not be awarded, of course, when Congressional intent is to the contrary. Intent to deny recovery of prejudgment interest may be obvious from the language of the statute itself. *See United States v. Goltra*, 312 U.S. 203, 207, 211 (1941) (statute governing plaintiff's claim against the United States provided no interest until "rendition of judgment"). Even when the statute is silent, intent to deny recovery of interest may be inferable from (i) the state of the law on prejudgment interest, for the type of claim involved, at the time the statute was passed, and (ii) con-

sistent denial by the courts of prejudgment interest under the statute and failure by Congress, despite amendments to the statute, to address prejudgment interest awards. *See Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 336-39 (1988) (denying prejudgment interest under Federal Employers' Liability Act).

Awards of prejudgment interest must not result in overcompensation of the plaintiff. Accordingly, the Court has suggested disapproval of such awards where the statute itself fixes damages deemed fully compensatory as a matter of law. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 699, 714-16 (1945) (interest not recoverable on liquidated damages provided by Fair Labor Standards Act of 1938). Similarly, prejudgment interest should not be awarded if the statutory obligation on which interest is sought is punitive in nature. *See Rodgers*, 332 U.S. at 374-76 (interest not recoverable on penalty imposed on farmer for exceeding quota under Agricultural Adjustment Act); *United States v. Childs*, 266 U.S. 304, 308-10 (1924) (interest recoverable on back taxes due, but not on penalty assessed for nonpayment).

The relative equities may make prejudgment interest inappropriate when the defendant acted innocently and had no reason to know of the wrongfulness of his actions, *see Jackson County*, 308 U.S. at 352–53; when there is a good faith dispute between the parties as to the existence of any liability, *see St. Louis & O'Fallon Ry. Co. v. United States*, 279 U.S. 461, 478, 483 (1929) (suit under Interstate Commerce Act to recover excess income allegedly earned); or when the plaintiff himself is responsible for the delay in recovery, *see Redfield v. Bartels*, 139 U.S. 694, 695, 702-03 (1891) (suit to recover duties wrongfully imposed; interest denied since plaintiff neglected bringing suit for years).

Our prejudgment interest decisions have been in accord with the Supreme Court's approach. We have allowed discretionary awards of prejudgment interest, notwithstanding the statute's silence on the subject of interest, when the awards were fair, equitable and necessary to compensate the wronged party fully. *See, e.g., EEOC v. County of Erie*, 751 F.2d 79, 81 (2d Cir. 1984) (award under Fair Labor Standards Act and Equal Pay Act) (citing *Rodgers v. United States*, 332 U.S. 371, 373 (1947)); *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir.) (award for breach of fiduciary duties by pension fund trustees under Employee Retirement and Income Security Act), *cert. denied*, 469 U.S. 1072 (1984); *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 153-54 (2d Cir. 1984) (foreign arbitral award under 9 U.S.C. § 207); *Mitsui & Co. v. American Export Lines, Inc.*, 636 F.2d 807, 823, 824 (2d Cir. 1981) (award under the Carriage of Goods by Sea Act) (citing *Miller v. Robertson*, 266 U.S. 243, 258 (1924)); *Rolf v. Blyth, Eastman Dillon & Co.*, 637 F.2d 77, 86-87 (2d Cir. 1980) (award under section 10(b) of the Securities Exchange Act of 1934) (citing *Blau v. Lehman*, 368 U.S. 403, 414 (1962)); *see also International Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 446-47 (2d Cir. 1975) (award in contract action brought under Section 301 of the LMRA), *cert. denied*, 429 U.S. 825 (1976).

By contrast, we have suggested that prejudgment interest is improper where the statute itself already provides for full compensation or punitive damages, *see Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 80 (2d Cir. 1971) (treble and punitive damages available under antitrust laws), *rev'd on other grounds*, 409 U.S. 363 (1973); *United States v. Foster Wheeler Corp.*, 447 F.2d 100, 102 (2d Cir. 1971) (double damages available under

False Claims Act); or where tradition or the language of the statute makes the award inappropriate, *see Gretchen v. United States*, 618 F.2d 177, 178 & n.2 (2d Cir. 1980) (Public Vessels Act failed to provide interest until "rendition of judgment"); *Gilroy v. Erie-Lackawanna R.R. Co.*, 44 F.R.D. 3, 4 (S.D.N.Y. 1968) (prejudgment interest "traditionally" not awarded on claims under Federal Employers' Liability Act).

The certainty of the damages due the plaintiff has been another factor in resolving prejudgment interest issues. The Supreme Court initially embraced the strict common law view that interest may not be recovered where damages are unliquidated, or difficult to ascertain with precision at the time of the alleged wrongdoing. *See, e.g., Mowry v. Whitney*, 81 U.S. (14 Wall.) 620, 653 (1872) (denying prejudgment interest in patent law infringement action). Accordingly, prejudgment interest originally was available only in contract actions, if at all. The reasoning of the common law was that interest would be unjust if the party committing the wrongdoing could not know exactly how much to tender to the wronged party to make the latter whole.

Even in the modern cases awarding prejudgment interest, damages have been ascertainable with precision, at least by the time of trial or judgment. For instance, the amount of back pay due an employee or the losses incurred in a fraudulent securities transaction could be calculated with certainty in many cases by the finder of fact, after consideration of the available information. However, the significant feature of these same cases was that no party could foresee, at the time of the wrongdoing, the full amount of damages that would result. The difficulty of computing a "make whole" amount frequently persisted until judgment itself. In an employment case,

nobody knows on the date of the wrongful termination the amount of back pay that will be necessary to make the plaintiff whole. The quantity can only be determined at trial, on the date verdict is rendered, and is therefore not "liquidated" in the common law sense. *See Greenberg v. Paramount Pictures, Inc.*, 85 F.2d 42, 45 (2d Cir. 1936) (L. Hand, J.). These problems of calculation also exist in cases in which the injury is more similar to Wickham's. In a securities fraud case, for example, no one knows on the date of the deception how much loss there will be in the value of the stock, or what the stock's price will be on the date suit is brought. Similarly, in a patent infringement case, it is impossible to determine at the time of infringement the profits that will be lost by one party or gained by the other. Yet, prejudgment interest awards have been upheld frequently in these and analogous cases, both by the Supreme Court and by this Court.

Accordingly, the old common law rule of liquidated damages no longer retains its full vitality. The Supreme Court has practically said as much, *see Miller*, 266 U.S. at 258; *see also Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 168-69 (1933), as have we, *see United Aircraft*, 534 F.2d at 447; *see also Greenberg*, 85 F.2d at 45, as has at least one other circuit, *see Eazor Express, Inc. v. International Bhd. of Teamsters*, 520 F.2d 951, 973 (3d Cir. 1975) (citing *Miller*, 266 U.S. at 258), *cert. denied*, 424 U.S. 935 (1976). Moreover, the current "equitable" and discretionary rule, based on the need for full compensation and fairness under the circumstances, necessarily rejects much of the common law's approach to prejudgment interest.

The speculative nature of the damages in question will always be relevant to a sound decision on a consideration of whether prejudgment interest should be awarded. How-

ever, the proper inquiry must include the other factors we have identified: analysis of the pertinent statute and its purposes; the need to fully compensate the injured party; fairness and the relative equities; and the specific circumstances of the parties and of the case. The degree of speculation must then be considered in light of these other factors to determine the propriety of prejudgment interest. We recognize that in some Section 303 actions the fact finder's calculation of losses suffered by the employer will be so conjectural that prejudgment interest should not be awarded. Nonetheless, while the presence of "abstruse inquiries" and "difficult questions of proof" in the calculation of damages are factors to be considered carefully, these problems must be considered together with other factors that may favor prejudgment interest. *See Hughes*, 449 F.2d at 80.

For the foregoing reasons, we cannot agree with the union that the silence of the LMRA on the subject of interest, or the unliquidated nature of damages in a Section 303 case, are sufficient without more to bar the award made to Wickham.

II. The Award of Interest Against the Union

The factors generally justifying an award of interest are present in this case. Wickham clearly suffered actual damage to its business because of the secondary strike. The union insists that Wickham's work on the schools was interrupted for only the two week period during which the Board of Education stop orders were outstanding, not for the two month period of the strike. There is some indication in the record, however, that the disruption in this case lasted for two months, from early July 1974 until early September 1974, when the strike was enjoined by a federal district court. *See Wickham I*, 542 F.2d at 862;

Wickham II, 715 F.2d at 23, 24. In any event, the disruptions and delays, whether of two weeks or two months, were of real impact. The stop orders issued by the Board of Education directed Wickham to remove all of its men and materials from the school construction sites. Initial compliance with the orders alone disrupted labor and supply schedules. Each of the three contracts had a duration of less than a calendar year, and we cannot say that a two week stoppage, in the context of the construction business in which Wickham is engaged, failed to cause further problems. The district court found that because of the delays, Wickham had to perform certain of its work while the schools were in session, and that the projects were more costly to complete as a result. There is nothing in the record to the contrary. *See also Wickham II*, 715 F.2d at 25. It is reasonable to believe (as the jury appears to have believed on the basis of the evidence presented) that the disruptions and delays caused by the strike eroded Wickham's expected profits from the contracts, by increasing overhead and supply costs and making Wickham's use of labor and resources less efficient than would have otherwise been the case.

Hence, Wickham was deprived of money that it otherwise would have earned but for the secondary strike. As Judge Mukasey pointed out, the damage was incurred by Wickham on September 1, 1975, the date on which Wickham was to have received payment under the original schedule contemplated by the contracts. Therefore, Wickham has been deprived of a sum owed to it, under Section 303 of the LMRA, for over 16 years. It was not an abuse of discretion for the district court to determine that prejudgment interest was necessary to compensate Wickham fairly under the circumstances, especially in view of high

inflation during several of those years. *See Rolf v. Blyth, Eastman Dillon & Co.*, 637 F.2d 77, 87 (2d Cir. 1980).

Further, as indicated by the language of Section 303(b), the purpose of the civil remedy provided by that provision is compensatory and remedial. *See Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton*, 377 U.S. 252, 260-61 (1964). Under the circumstances of this case, an award of prejudgment interest comports with the remedial scheme of the statute. By contrast, the factors that have led federal courts to deny prejudgment interest awards are markedly absent in this case.

There is no indication that Congress intended to deny recovery of prejudgment interest in Section 303 cases. In *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988), a case involving a personal injury suit by a railroad employee, the Supreme Court concluded that prejudgment interest awards under FELA were contrary to the intent of Congress. The Court reached this conclusion because (i) in 1908, at the time FELA was passed, the common law rule barring recovery of interest in tort actions was still in force, and (ii) a great many state and federal courts had concluded with "virtual unanimity" over the years since the passage of FELA that prejudgment interest should not be available under the statute. *See id.* at 337–39. The Court held that under these circumstances, intent to deny interest recovery could be inferred from both the original silence of Congress on the subject of prejudgment interest, and Congress' failure, despite many amendments to FELA, to make any additions on the subject to the statute in the face of unanimous court holdings denying interest. *See id.*

There is no similar indication that Congress intended to deny recovery of prejudgment interest in actions under

Section 303 of the LMRA. The legislative history of the LMRA is as silent as that of FELA on the subject of prejudgment interest. However, the LMRA was passed in 1947, well after the passage of FELA. By the 1940s, the common law rule against prejudgment interest in cases of unliquidated damages and tort actions had eroded severely, and was supplanted by an equitable and discretionary approach emphasizing compensation. *See Prager v. New Jersey Fidelity and Plate Glass Ins. Co.*, 245 N.Y. 1, 5-6 (1927) (Cardozo, C.J.) (noting that in cases involving prejudgment interest considerations of "policy and justice" frequently controlled, and that interest may be necessary to make plaintiff whole); *see also Greenberg v. Paramount Pictures*, 85 F.2d 42, 45 (2d Cir. 1936) (L. Hand, J.).

Prejudgment interest in personal injury cases similar to those covered by FELA has not become accepted even to this day. By contrast, awards of prejudgment interest, without inquiry into the certainty of the losses suffered at the time of the wrongdoing, were acceptable well before the passage of the LMRA in tort cases involving injury to property or business. *See Flamm v. Noble*, 296 N.Y. 262, 267-68 (1947) (citing *McCormick v. Pennsylvania Cent. R.R. Co.*, 49 N.Y. 303 (1872); *Parrot v. Knickerbocker Ice Co.*, 46 N.Y. 361 (1871); *Andrews v. Durant*, 18 N.Y. 496 (1859)). Moreover, the Supreme Court itself decided *Miller* in 1924, *Waite* in 1931, *Funkhouser* in 1933, and *Jackson County* in 1939, all well before passage of the LMRA. The *Rodgers* decision was handed down in 1947, the very year the LMRA was passed. The Court's language in these cases strongly suggested an abandonment of the common law approach to prejudgment interest under federal statutes, and endorsement of a more discretionary approach.

Unlike the plethora of courts that have rejected recovery of prejudgment interest under FELA, only a relatively small number of courts have considered directly the issue of prejudgment interest under Section 303 of the LMRA. Of the courts that have considered the issue, few have expressed the hostility to prejudgment interest we perceive in the FELA cases. Moreover, the long history of denial of prejudgment interest in the FELA cases, and emphasized in *Monessen*, is wholly absent in the context of the LMRA.

The Eighth Circuit has disallowed prejudgment interest in a Section 303 case, apparently on common law reasoning that damages in a Section 303 action are by definition unliquidated. *See Noranda Aluminum, Inc. v. United Bhd. of Carpenters and Joiners*, 528 F.2d 1304, 1310 (8th Cir.), *cert. denied*, 429 U.S. 835 (1976). This strict approach appears to have been followed once in the District of Massachusetts, without discussion of the matter by the First Circuit on appeal. *See John B. Cruz Const. Co. v. United Bhd. of Carpenters and Joiners*, No. 84-2041MC, 1989 WL 63680 (D. Mass. 1989), *aff'd* 907 F.2d 1228 (1st Cir. 1990). On the other hand, prejudgment interest in Section 303 suits has been awarded (with neither discussion on the merits nor reversal by the court of appeals) in the District of Massachusetts, *see Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 814 F.2d 32 (1st Cir.), *cert. denied*, 484 U.S. 820 (1987); in the Western District of Pennsylvania, *see C&K Coal Co. v. United Mine Workers of Am.*, 537 F. Supp. 480 (W.D. Pa. 1982), *aff'd and rev'd in part on other grounds*, 704 F.2d 690 (3d Cir. 1983); and in the Southern District of Mississippi, *see Gulf Coast Bldg. & Supply Co. v. International Bhd. of Elec. Workers*, 460 F.2d 105 (5th Cir. 1972).

While the Third Circuit has set aside a prejudgment interest award under Section 303, we find it significant that the court did not apply a *per se* rule against the award. Rather, the court applied an equitable rule similar to the one we have discussed here, and decided that on the particular facts of that case no unjust enrichment meriting interest compensation existed. *See Feather v. United Mine Workers of Am.*, 711 F.2d 530, 540-41 (3d Cir. 1983). Similarly, in an opinion remanding a Section 303 case to the Eastern District of Wisconsin with guidelines for recomputation of damages, the Seventh Circuit passed over without adverse comment the district court's award of prejudgment interest on the original amount of damages calculated. *See Boxhorn's Big Muskego Gun Club v. Electrical Workers Local 494*, 798 F.2d 1016, 1022-23 (7th Cir. 1986). We note also that the Third Circuit has upheld an award of interest in a dispute under Section 301 of the LMRA for breach of contract. *See Eazor Express, Inc. v. International Bhd. of Teamsters*, 520 F.2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976). Likewise, we reversed and remanded a district court decision not to grant interest in a Section 301 action, noting that such a grant might have been entirely appropriate under the circumstances. *See United Aircraft*, 534 F.2d at 446-47.

The LMRA does not fix liquidated damages, and does not double or treble damages. Nor is a Section 303(b) award punitive in nature. Therefore, the interest award to Wickham is not overly compensatory or otherwise improper. Moreover, there is no basis in the history of the dispute between Wickham and the union for concluding that the union acted innocently or that the union's actions against Wickham were taken in good faith. While there are cases in which it is difficult to determine whether an unlawful secondary strike has occurred, this is not one of

those cases. There is every indication in this case that the union knew it was clearly violating a specific statutory duty erected by the LMRA. *See Wickham I*, 542 F.2d at 863, 865-67. Moreover, as we observed shortly after the strike, the union's coercive attempt to oust the Teamsters as bargaining representative of Wickham's employees itself was of "dubious legality," and a "fundamental abuse" of the responsibilities of a labor organization. *See id.* at 865, 867.

The availability of both injunctive and monetary relief under the labor laws for secondary strikes reflects a strong national policy against behavior Congress found quite objectionable. *See* Robert A. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 291 (1976). The policy is rooted in the desire to protect innocent third parties from labor disputes. In this case, the union's unlawful activity led to the disruption of public schools. These observations are offered not to suggest in any way that the union deserves to be penalized by an award of prejudgment interest, but rather to emphasize that the award does not strike us as inequitable under the circumstances.

We do not agree with the union that the Supreme Court's decision in *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), militates against an award of interest in this case. *Laborers Health* did not even address the question of prejudgment interest, but rather involved a jurisdictional question arising under ERISA. While the Court did state in dicta that prejudgment interest awards become "problematic" in labor cases where there is a "good-faith dispute over both the existence and the extent of the employer's liability," the Court also noted that "it is entirely appropriate to award prejudgment interest" when

a specific contractual provision is breached. *See id.* at 551-52. As we have said, it is improbable that the union's actions toward Wickham were taken in good faith; and, in any event, whatever doubts there may have been as to the exact amount of the union's liability, there has been little doubt for years that the union breached a specific duty imposed by the LMRA. In *Laborers Health*, by contrast, the employer simply ceased to make contributions to a pension plan after the contract obligating him to do so had expired. *See id.* at 542. That is a far cry from what went on here.

The union further contends that, although a jury determined that the union was civilly liable to Wickham in 1982, the extent of that liability was not established until 1991 and therefore it would be unfair for interest to accrue prior to that time. We disagree. It was entirely appropriate for Judge Mukasey to choose the date of injury as the date on which prejudgment interest should begin to accrue. *See Taliercio v. Compania Empressa Lineas Argentina*, 761 F.2d 126, 129 (2d Cir. 1985). It is also worth recalling that in 1975, both the NLRB and this Court determined that a "secondary boycott"—the basis of civil liability under Section 303—had occurred. While these determinations had no res judicata effect on the civil suit as such, they did provide early notice of potential civil liability.

The district court also determined that the long delay in obtaining judgment on the amount of damages was due essentially to procedural matters beyond Wickham's control. The record does not suggest that this determination is clearly erroneous, and we are not in a position to reexamine *de novo* the 17 year procedural history of this dispute. Moreover, it is undisputed that Wickham promptly commenced its Section 303(b) suit in 1974. Accordingly,

we see no basis for reversing the interest award on grounds of delay by the plaintiff.

Lastly, the damages suffered by Wickham in this case were not so conjectural that an award of prejudgment interest was an abuse of discretion under the circumstances. The total revenue to be earned by Wickham under the three contracts was known with certainty to be $502,000. Further, as an experienced contractor, Wickham probably had a good idea of the expected cost of labor and materials. The trial testimony of Biele, Wickham's President, was that Wickham expected a 10% profit. We realize that Biele could not recall where this figure came from, but note that the same profit margin is given in a 1974 letter from Wickham to the Board of Education. The letter was an exhibit at trial. Further, as we noted in our earlier decision remanding this case for a new trial on damages, only the work stoppage could provide a legal basis for recovery under Section 303(b), since no evidence existed linking the union's activities to the various other misfortunes that Wickham suffered at the time. *See Wickham II*, 715 F.2d at 25, 28–29.

Therefore, the upper limit on damages could be calculated with some certainty at about $50,200, the total profits expected under the three contracts. The jury's task was relatively discrete: to determine how much of this expected profit was eroded due to the work stoppage, or, as Judge Mukasey put it in his instructions, to determine what Wickham "would have earned less the amount [Wickham] actually earned."

According to the union, the jury declined to engage in such calculations and instead speculated as to damages by awarding Wickham "precisely" 10% of lost profits on only two contracts, those governing the work at P.S. 8 and

P.S. 41. The union also contends, coincidentally, that Wickham's work was disrupted only at these two schools because workers were not present at the Tremont Early Childhood Center on the day the Board of Education stop orders were issued. The record leaves us unconvinced of either contention. The total price of the P.S. 8 and P.S. 41 contracts was $406,000. Lost profits on these contracts would have been $40,600, not $41,000.

It is possible that the jury did that which the union contends, but simply rounded upwards. Yet Wickham has maintained all along that work was disrupted at Tremont as well, and for 15 years the facts of this case have suggested that all projects were affected. *See Wickham I*, 542 F.2d at 862; *Wickham II*, 715 F.2d at 23. Even if nobody were present at the Tremont site the day the stop orders were issued, it is hardly unreasonable to believe that the terms of the stop orders prevented people from returning to the Tremont site, or otherwise disrupted the Tremont project.

Therefore, it is equally possible that the jury began with $50,200 expected profit for all three contracts, and then made a determination that about 80% of this sum was lost by Wickham due to increased costs and lost efficiencies. This determination does not strike us unreasonable or unduly speculative on the basis of the evidence presented at trial. In this connection, we note that the union has appealed neither Judge Mukasey's evidentiary rulings nor the amount of the jury's award.

We have carefully considered the union's remaining arguments, and find them to be without merit.

CONCLUSION

The judgment of the district court awarding prejudgment interest under Section 303(b) of the LMRA is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WICKHAM CONTRACTING CO., INC. and RALPH PERONE, as a Joint Venture,

Plaintiffs,

- against -

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Defendant.

OPINION AND ORDER

MICHAEL B. MUKASEY, U.S.J.D.

This brief opinion is occasioned by the parties' dispute as to whether plaintiffs, which were awarded $41,000 by a jury as damages resulting from defendant's unlawful secondary boycott, should receive prejudgment interest. This is no small matter in this case because, as the docket number of the case suggests, the underlying facts occurred about 17 years ago.

Defendant's counsel asserts in a letter to the court dated April 29, 1991 that an award of prejudgment interest was proposed by the court sua sponte, and that it is "hornbook law that absent legislative authorization ... a Court may award prejudgment interest only when the damages recovered were liquidated...." Neither assertion is correct. Plaintiffs raised the issue of prejudgment interest, and the correct statement of the law is that prejudgment interest is mandatory when the amount is liquidated, but otherwise is within the discretion of the court guided by "fundamental considerations of fairness." Rolf v. Blyth, Eastman Dillon & Co., Inc., 637 F.2d 77, 87 (2d Cir. 1980).

Those considerations warrant an award of prejudgment interest here. Defendant's violations of the labor laws was clear and liability was deter-

mined long ago. The jury's award was small and recognized the added costs to plaintiff and its losses that resulted from having to do added work on the projects affected by defendant's conduct, and to do work while school was open instead of while school was in recess, under radically different conditions from those anticipated when plaintiffs bid on the renovation contracts in question. The delay in adjudicating damages is not attributable to plaintiffs but rather is due to the tortured procedural history of this case, which was assigned to my docket in 1989. Plaintiffs have been deprived of the use of the funds since the time of the events in question.

Plaintiffs have submitted a judgment calling for interest from July 22, 1974, the date plaintiffs were directed to stop work on the projects affected by defendant's wrongful acts. A more

appropriate date would appear to be the date by which plaintiffs could have expected to be paid for their work. Although the record does not reflect a precise date when such payment would have been made, it does reflect that plaintiffs continued work well into the 1974-75 school year. Accordingly, interest will be awarded from September 1, 1975. Settle judgment accordingly on five days' notice following the date when plaintiffs' counsel returns to his office.

SO ORDERED:

/s/ MICHAEL B. MUKASEY

Michael B. Mukasey
U. S.District Judge

DATED: New York, New York
May 14, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WICKHAM CONTRACTING CO., INC. and RALPH PERONE, as a Joint Venture,

Plaintiffs,

- against -

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Defendants.

JUDGMENT

74 Civ. 3248 (MBM)

The above-entitled action having come on for trial before the Hon. Michael Mukasey and a jury of six in the United States District Court for the Southern District of New York, commencing on April 16, 1991 and concluding on April 22, 1991, and the plaintiffs having appeared by their attorney, Joseph E. Gulmi, and the defendant having appeared by its attorney, Norman Rothfeld, and the allegations and proofs herein having been heard by a jury of six and due deli-

beration having been had and the jury having duly rendered a unanimous verdict in favor of the plaintiffs on April 23, 1991, in the sum of $41,000 against the defendant, and this Court in its Opinion and Order having awarded to the plaintiff prejudgment interest from September 1, 1974,

Now, on motion of Norman Rothfeld, attorney for the defendant, it is

ORDERED, ADJUDGED AND DECREED, that the plaintiffs, Wickham Contracting Co., Inc. and Ralph Person, as a Joint Venture, located at 415 Fifth Avenue, Pelham, New York, have a judgment against the defendant, Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, located at 158-11 Harry Van Arsdale Jr. Avenue, Flushing, New York, in the sum of $91,905, together with the costs and necessary disbursements of this action, to be taxed by the Clerk of this Court,

and that plaintiffs have execution therefor, which execution is stayed for a period of thirty (30) days from the date of this judgment.

Dated: New York, New York
May 30, 1991

/s/ MICHAEL B. MUKASEY

UNITED STATES DISTRICT JUDGE

THIS DOCUMENT WAS ENTERED ON June 3, 1991

STATUTES

Pertinent text of 29 U.S.C. §187:

> SEC. 303. (a) It shall be unlawful...for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States...and shall recover the damages by him sustained and the cost of the suit.

Pertinent text of 28 U.S.C. §1961:

> §1961. Interest
>
> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court....Such interest shall be calculated from the date of entry of the judgment....

Supreme Court, U.S.
FILED
SEP 25 1992
OFFICE OF THE CLERK

No. 91-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

LOCAL UNION NUMBER 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

v.

WICKHAM CONTRACTING CO., INC. and RALPH PERONE, as a Joint Venture,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly applied the "equitable rule" in determining if the district court abused its discretion in granting prejudgment interest.

2. Whether the granting of prejudgment interest in this case was within the sound discretion of the district court.

3. Whether review of this case would embroil the Court in a factual inquiry more appropriately conducted by the district and circuit courts.

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In The

Supreme Court of the United States
October Term, 1992

No. 91-1740

LOCAL UNION NUMBER 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

- against -

WICKHAM CONTRACTING CO., INC. and RALPH PERONE, as a Joint Venture,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PRELIMINARY STATEMENT

Respondents respectfully submit this brief in opposition to a grant of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals for the Second Circuit is reported at 955 F.2d 831 and appears in the appendix. It affirmed the Judgment of the U.S. District Court for the Southern District of New York (Mukasey, J.), which appears in the appendix. This Judgment, inter alia, awarded respondents prejudgment interest in the amount of $50,905.

JURISDICTION

The Court's jurisdiction is invoked pursuant to 62 Stat. 928, 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statute is § 303 of the Labor Management Relations Act, 29 U.S.C. § 187, the pertinent text of which is set forth in the appendix.

STATEMENT OF THE CASE

Respondents adopt Circuit Judge Miner's rendition of the facts of this case, as reported in the Opinion below.

REASONS FOR DENYING THE WRIT

I. THIS CASE WAS RIGHTLY DECIDED BY THE SECOND CIRCUIT

In determining whether the district court abused its discretion in awarding prejudgment interest, the Second Circuit applied the well recognized "equitable rule", which stresses the need for full compensation and balancing of the equities in a particular situation. See Wickham Contracting Co. Inc. v. Local Union No. 3, 955 F.2d 831, 837 (2d Cir. 1992). (Hereinafter "Opinion"). This approach is wholly consistent with Supreme Court precedent and the decisions of other circuit courts. To the extent that the Opinion conflicts with the 1976 decision of the Eighth Circuit in Noranda Aluminum, Inc. v. United Brotherhood of Carpenters and Joiners, 528 F.2d 1304, 1310 (8th Cir.), cert denied, 429 U.S. 835 (1976), this latter

decision is an aberration, based on antiquated common law reasoning which has previously been rejected by the Supreme Court.

THE DECISION OF THE SECOND CIRCUIT IS WHOLLY CONSISTENT WITH SUPREME COURT PRECEDENT

A. Award of Prejudgment Interest Is Permissible Even Where Congress Did Not Authorize Such Awards

Petitioner argues that writ should be granted because the Second Circuit's decision conflicts with the Supreme Court's "recent teaching limiting the jurisdiction of district courts to award prejudgment interest when Congress did not authorize such awards." Contrary to petitioner's assertion, the Court has allowed recovery of prejudgment interest awards "under a variety of federal laws, despite the silence of the laws on the subject of interest." Opinion at 834. See

also, Loeffler v. Frank, 486 U.S. 549, 557-58 (1988) (prejudgment interest allowed in suit for back pay under Title VII, despite statute's silence on the subject); Jacobs v. U.S., 290 U.S. 13, 16-17 (1933) (prejudgment interest permitted in Fifth Amendment takings case as part of "just compensation"); Waite v. U.S., 282 U.S. 508, 509 (1931) (prejudgment interest permitted in patent law infringement suit; interest viewed as part of "entire compensation" to which statute referred); Miller v. Robertson, 266 U.S. 243, 250, 258 (1924) (prejudgment interest permitted despite silence of "Trading With the Enemy Act"); Seaboard Air Line Ry. Co. v. U.S., 261 U.S. 299, 302, 304-06 (1923) (despite silence of Lever Act, prejudgment interest was allowed because it was viewed as part of "just compensation" to which statute referred); Billings v. U.S., 232 U.S. 261, 284-88 (1914) (prejudgment interest award

upheld in suit to recover federal excise taxes paid, despite silence of statute). In view of the cases cited above in which interest was awarded despite statutory silence on the matter, petitioner's argument is clearly lacking in merit.

B. The Second Circuit's Opinion Does Not Conflict with the Court's Holdings in Monessen, Laborers Trust Fund and Teamsters, Chauffeurs and Helpers Union

Petitioner further asserts that the Opinion conflicts with this Court's teaching in Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988), Laborers Health and Welfare Trust Fund v. Advance Lightweight Concrete Co., Inc., 484 U.S. 539 (1988) and Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton, 377 U.S. 252 (1964). However, "[t]he mere assertion of conflict with Supreme Court precedent will not suffice (as grounds for Supreme Court review). Rule

10 requires that the application of the precedent to the case at bar be clear, and that the state court or the federal court of appeals, did not follow that precedent." 13 Moore's Federal Practice § 810.45 at SC10-51 (1991) (parentheses added). See also, 13 Moore's Federal Practice § 810.45 at n. 5 (1991) (demonstrating how the history of Rule 10 indicates that a clear and unambiguous conflict between a court decision and Supreme Court cases must be shown before certiorari should be granted). As is demonstrated below, the Opinion does not conflict with the Supreme Court cases cited by petitioner.

Monessen was a personal injury action brought by a railroad employee in which the Court held that awards of prejudgment interest under the Federal Employer's Liability Act (FELA) were contrary to the intent of Congress. See 486 U.S. at 336-339. The intent of Congress in relation to FELA

was inferred by the Court from the fact that (1) at the time FELA was passed in 1908, the common law did not allow recovery of prejudgment interest in personal injury or wrongful death actions and (2) since the passage of FELA, Congress has not amended the statute as to permit prejudgment interest recovery, despite the plethora of cases denying prejudgment interest recovery in FELA cases. Id. at 337-339. Petitioner argues that based on Monessen, it can be inferred that the failure of Congress to amend § 303 as to authorize prejudgment interest awards indicates congressional intent to deny such relief.

Petitioner's reading of Monessen is overly broad and inaccurate. Monessen itself states that its inferences regarding congressional intent are based on the "appropriate historical context" surrounding FELA, i.e., the state of the common law at

the time of its passage and failure to amend the statute in the face of an abundance of court decisions denying prejudgment interest recovery in FELA cases. Id. at 337-338 and n. 9. In contrast, § 303 was passed at a time when the common law was receptive to awards of prejudgment interest. See Opinion at 837-38. Moreover, no inference can be drawn from the fact that § 303 was never amended to authorize prejudgment interest awards because, unlike the FELA situation, Congress was never faced with a plethora of decisions rejecting prejudgment interest in cases under § 303. Id. at 838. Therefore, contrary to petitioner's conjecture and speculation regarding congressional intent, Congress has never even suggested its disapproval of prejudgment interest awards in § 303 cases.

Similarly, the Opinion does not conflict with Laborers Health and Welfare Trust Fund.

That case involved an ERISA jurisdictional question and had nothing to do with prejudgment interest. See 484 U.S. at 541, 552. Laborers' comment in dicta that prejudgment interest awards are "problematic in cases in which there is a good-faith dispute over both the existence and the extent of the employer's liability" are inapposite because in this case there was never a good faith dispute about the existence of liability.[1]

Finally, the Second Circuit's decision does not conflict, even slightly, with this

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[1] Petitioner admits that a good faith dispute existed only in regard to the extent of the union's liability. See Petition at 12. It now asks this Court to rule on whether it approves of prejudgment interest awards "where there is not a good faith dispute over the existence of some liability but there is a good faith dispute over the extent of that liability." Id. However, petitioner fails to cite to any cases below which debate this narrow issue and, consequently, it is unworthy of Supreme Court review.

Court's 1964 decision in Chauffeurs and Helpers Union. In that case, the Court held that punitive damages were not available under § 303. See 377 U.S. at 260-61. Chauffeurs and Helpers Union had nothing to do with prejudgment interest awards.

Furthermore, while the statutory language of § 303 was a basis for the conclusion that punitive damages should not be allowed, see 377 U.S. at 260, that same language does not in any way imply that awards of prejudgment interest should not be allowed. The statute speaks of recovery of "the damages by him sustained." See 29 U.S.C. 187(b). Clearly, punitive damages are not "damages sustained" in that their object is not compensation but penalization. In stark contrast, prejudgment interest is meant to compensate a plaintiff for the loss of funds which could have been invested and is

clearly encompassed by the phrase "damages sustained."

In sum, petitioner has attempted to conjure up a conflict between the Second Circuit decision and Supreme Court cases where none exists. As such, there is no reason for Supreme Court review of the Opinion.

C. Noranda Is Based on Antiquated Reasoning Which Has Previously Been Rejected by the Courts

Petitioner asserts that the 1976 decision of the Eighth Circuit in Noranda, which disallowed prejudgment interest in a § 303 case based on the common law rule denying prejudgment interest in unliquidated damage cases, conflicts with the Opinion below. Noranda is an aberration that is based on obsolete reasoning which has previously been rejected by the courts.

This Court recognized long ago that the common law rule denying prejudgment interest in unliquidated damage cases should be rejected where the equities favored awarding such interest. In 1924, the Court commented in Miller v. Robertson, 266 U.S. 243, 258:

> Generally, interest is not allowed upon unliquidated damages . . . But when necessary in order to arrive at fair compensation, the court in the exercise of sound discretion may include interest or its equivalent as an element of damages.

See also, Funkhouser v. J.B. Preston Co., Inc., 290 U.S. 163, 168-69 (1933) (noting that law was evolving as to permit prejudgment interest awards based on considerations of justice and practicality; determinations based on distinction between liquidated and unliquidated damages viewed as "not sound").

Moreover, other circuit courts have applied the same "equitable rule" employed by

the Second Circuit below. For example, in Feather v. United Mine Workers of America, 711 F.2d 530 (3d Cir. 1983), the Court disallowed a prejudgment interest award in a § 303 case where the particular facts of that case suggested that no unjust enrichment of defendant had occurred which merited interest compensation. See 711 F.2d at 540-41.[2] Similarly, awards of interest in cases brought pursuant to § 301 of LMRA have been upheld by the Courts of Appeal. See e.g., Eazor Express, Inc. v. International Brotherhood of Teamsters, 520 F.2d 951 (3d

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[2] Note that prejudgment interest in § 303 cases has been awarded with neither discussion of the merits nor reversal by the Court of Appeals in the following cases: Allied International, Inc. v. International Longshoremen's Assoc., 814 F.2d 32 (1st Cir.), cert. denied, 484 U.S. 820 (1987); Gulf Coast Bldg. & Supply Co. v. International Brotherhood of Electrical Workers, 460 F.2d 105 (5th Cir. 1972); C&K Coal Co. v. United Mine Workers of America, 537 F.Supp. 480 (W.D. Pa. 1982), aff'd and rev'd in part on other grounds, 704 F.2d 690 (3d Cir. 1983).

Cir. 1975), cert. denied, 424 U.S. 935 (1976). Indeed the Second Circuit reversed and remanded a district court § 301 case which denied prejudgment interest, noting that granting interest may have been appropriate under the circumstances. See International Association of Machinists v. United Aircraft Corp., 534 F.2d 422, 446-47 (2d Cir. 1975), cert. denied, 429 U.S. 825 (1976).

Tellingly, a recent decision of the Eighth Circuit indicates that that circuit currently employs the same "equitable rule" applied by the Opinion below. In EEOC v. Delight Wholesale Co., No. 91-3661, 1992 WL 202551 (8th Cir., August 25, 1992), the Eighth Circuit upheld denial of prejudgment interest in a suit for back pay under Title VII. See Delight Wholesale Co. at 5. Since the exact amount of back pay required to make a plaintiff whole is not ascertainable with

precision until a verdict is rendered, back pay cannot be characterized as liquidated damages in the common law sense. See Greenberg v. Paramount Pictures, Inc., 85 F.2d 42, 45 (2d Cir. 1936) (L. Hand, J.). Nevertheless, the Eighth Circuit denied prejudgment interest in this case employing an "equitable rule" analysis:

> EEOC next asserts that the district court erred by denying an award of prejudgment interest. The decision to award or deny prejudgment interest will be upheld unless the district court has abused its discretion. EEOC v. Rath Packing Co., 787 F.2d 318, 333 (8th Cir.) (citation omitted), cert. denied, 479 U.S. 910 (1986); Washington v. Kroger Co., 671 F.2d 1072, 1078 (8th Cir. 1982). After balancing Title VII's purpose of make whole relief against countervailing considerations, including EEOC's delay in bringing suit, Childer's (plaintiff) unstable employment history and Delight's (defendant) change in ownership, the district court concluded that back pay alone was sufficient to compensate Childers. Delight 765 F.Supp.

> at 592. On these facts, we find no abuse of discretion.

Delight Wholesale Co. at 6.

What emerges is that the common law rule employed in Noranda has been rejected by the Supreme Court and the Courts of Appeal. In its place, determinations regarding prejudgment interest are made by balancing the equities, based on the particular facts of a given situation. In view of the fact that currently even the Eighth Circuit ignores its own decision in Noranda, there is no reason for this Court to pay it any heed.

II. THE GRANTING OF PREJUDGMENT INTEREST IN THIS CASE WAS WITHIN THE SOUND DISCRETION OF THE DISTRICT COURT

Petitioner argues that the issue of prejudgment interest should have been submitted to the jury. However, the law is clear that the district court has broad discretion to award prejudgment interest when

it is necessary to fully compensate an aggrieved party.

In Seaboard Air Line Railway Co. v. U.S., 261 U.S. 299 (1923), this Court upheld the district court's discretionary award of prejudgment interest in an action brought pursuant to the Lever Act, despite the fact that the case was tried by a jury. See 261 U.S. at 306. In that case, a jury verdict determined that plaintiff was entitled to $6,000 as "just compensation" for the government taking of his property. Id. at 303. The district court added prejudgment interest to the jury verdict. Id. In affirming the district court award of prejudgment interest, the Court commented:

> The addition of interest allowed by the District Court is necessary in order that the owner shall not suffer loss and shall have "just compensation" to which he is entitled.

Id. at 306.

Furthermore, the cases cited by petitioner for the proposition that a prejudgment interest award should have been decided by the jury are clearly distinguishable. None of the cases cited have anything to do with the labor laws, much less § 303 of LMRA. See Petersen v. Chesapeake & Ohio Railway Co., 784 F.2d 732, 734, 740 (6th Cir. 1986) (action based on Jones Act, 46 U.S.C. § 688 and general maritime law); Havis v. Petroleum Helicopters, Inc., 664 F.2d 54, 55 (5th Cir. 1982) (action brought pursuant to maritime law); Furtado v. Bishop, 604 F.2d 80, 84 (1st Cir. 1979) (civil rights action brought pursuant to 42 U.S.C. § 1983); Hertz v. Graham, 292 F.2d 443, 444 (2d Cir. 1961) (negligence action for the death of a race horse); Newburgh Land & Dock Co. v. Texas Co., 227 F.2d 732, 733 (2d Cir. 1955) (action

based on maritime law). In marked contrast, district court additions of prejudgment interest to jury verdicts in § 303 cases have been affirmed on appeal. See e.g., Gulf Coast Bldg. & Supply Co. v. International Brotherhood of Electrical Workers, 460 F.2d 105, 107 (5th Cir. 1972).

Based on all of the above, it is clear that at least in a § 303 case, decisions regarding prejudgment interest awards are within the sound discretion of the district court. Petitioner's assertion that the issue should have been submitted to the jury is meritless.

III. REVIEW OF THIS CASE WOULD EMBROIL THE COURT IN A FACTUAL INQUIRY MORE APPROPRIATELY CONDUCTED BY THE DISTRICT AND CIRCUIT COURTS

In U.S. v. Johnston, Justice Holmes writing on behalf of a unanimous Court stated "We do not grant a certiorari to review

evidence and discuss specific facts." 268 U.S. 220, 227 (1925). See also, NLRB v. Pittsburgh Steamship Co., 340 U.S. 498, 503 (1951) ("This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way"). Justice Holmes' comment quoted above is relevant because review of the instant case would embroil this Court in reevaluation of facts which were passed upon decisively by both the district court and court of appeals.

In order for the Court to decide whether a discretionary award of prejudgment interest is permissible in a particular case, the Court must consider fairness and the relative equities involved. See Blau v. Lehman, 368 U.S. 403, 414 (1962). As the Opinion of the Second Circuit correctly pointed out at 834-

35, "[t]he relative equities may make pre-judgment interest inappropriate when . . . the plaintiff himself is responsible for the delay in recovery." See Redfield v. Bartels, 139 U.S. 694, 695, 702-03 (1891). Hence, for the Supreme Court to decide the issue of pre-judgment interest, it would have to involve itself in a factual inquiry regarding which party is at fault for the delay in prosecuting this case. In view of the need for factual inquiry, this case is particularly ill-suited for Supreme Court review.[3]

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[3] This issue was litigated extensively below and both the district court and court of appeals concluded that plaintiff does not bear the blame for the long delay in obtaining judgment on the amount of damages. See Opinion at 839.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 482—August Term, 1991

(Argued November 6, 1991 Decided January 29, 1992)

Docket No. 91-7713

WICKHAM CONTRACTING CO., INC.; RALPH PERONE,

Plaintiffs-Appellees,

—against—

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Defendant-Appellant.

Before:

CARDAMONE, PIERCE and MINER,

Circuit Judges.

Appeal from judgment of the United States District Court for the Southern District of New York (Mukasey, *J.*) awarding prejudgment interest on damages recovered by

employer under Section 303(b) of the Labor Management Relations Act for union secondary strike.

Affirmed.

NORMAN ROTHFELD, New York, NY, *for Defendant-Appellant.*

JOSEPH E. GULMI, New York, NY (Allan J. Parker, Shea & Gould, New York, NY, of counsel), *for Plaintiffs-Appellees.*

MINER, *Circuit Judge*:

Defendant-appellant Local No. 3 of the International Brotherhood of Electrical Workers ("union") appeals from a judgment of the United States District Court for the Southern District of New York (Mukasey, *J.*) awarding prejudgment interest on damages recovered by plaintiffs-appellees Wickham Contracting Co. and Ralph Peroni (collectively, "Wickham"), as employers and former joint venture partners. The damages were awarded under Section 303(b) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. §§ 141–97, which provides a civil remedy to employers sustaining damages from secondary strike activity by a labor organization. *See* 29 U.S.C. § 187.

The union contends that prejudgment interest is inappropriate in Section 303 cases because the LMRA, being silent on the subject of prejudgment interest, provides no "statutory authority" for such awards, and because the

amages involved are unliquidated, or difficult to ascer-ain prior to judgment. The union further contends that, ven if prejudgment interest may be awarded under Sec-on 303, the district court erred in awarding interest in is particular case. We have not previously addressed the uestion of prejudgment interest under this provision of e LMRA. For the reasons that follow, we hold that an ward of prejudgment interest under Section 303 is within e sound discretion of a district court, and that Judge fukasey did not abuse his discretion in awarding interest this case.

BACKGROUND

The union represents electricians who are employed by ontractors to perform electrical construction work. Wick-am was an electrical contractor. In early 1974, Wickham ntered into contracts with the Board of Education of the ity of New York under which Wickham was to perform ectrical modernization and construction work at three ew York City public schools, P.S. 8, P.S. 41, and the remont Early Childhood Center. Wickham's electricians ere represented by Teamsters Local 363.

During the week of July 8, 1974, while Wickham's ork on the schools was under way, the union caused its embers to strike against all electrical contractors per-rming work for the Board of Education. The immediate oal of the strike was to force the Board of Education to ease doing business with Wickham. The ultimate goal of e strike was to oust the Teamsters from their position as presentative of Wickham's electricians.

On July 22, 1974, the Board of Education issued stop ork orders to every electrical contractor that did not

have a collective bargaining agreement with the union, including Wickham. Wickham's work on the schools came to an immediate halt. Wickham commenced this civil suit against the union under Section 303(b) of the LMRA on July 29, 1974. At the same time, Wickham filed unfair labor practice charges with the NLRB.

The Board of Education rescinded its stop orders on August 6, 1974, although the union's walkout apparently continued until September 13, 1974, when a temporary restraining order was issued against the strike by the United States District Court for the Eastern District of New York. On September 19, 1974, the union lost a representation election to the Teamsters, and the NLRB certified the Teamsters as the bargaining representative of Wickham's electricians the following month.

On September 26, 1975, the NLRB found that the union had engaged in an unfair labor practice under Section 8(b)(4) of the National Labor Relations Act ("NLRA"), and issued a cease and desist order. The NLRB's determination and order were upheld by this Court the following year. *See NLRB v. Local 3, Int'l Bhd. of Elect. Workers*, 542 F.2d 860 (2d Cir. 1976) ("*Wickham I*"). In the civil suit commenced by Wickham, a jury eventually found the union liable in 1982, and awarded $959,000 in damages under Section 303. We affirmed the jury's finding of liability, but remanded the case for a new trial on the amount of damages. *See Wickham Contracting Co. v. Board of Educ.*, 715 F.2d 21 (2d Cir. 1983) ("*Wickham II*").

The new damages trial was not held until April 1991. The jury returned an award of $41,000. At Wickham's request, Judge Mukasey awarded prejudgment interest on this amount accruing from September 1, 1975. The inter-

:st component amounted to $50,905, for a total award to Wickham of $91,905.

DISCUSSION

Section 303(a) of the LMRA makes it unlawful for a abor organization to engage in conduct defined as an unfair labor practice" in Section 8(b)(4) of the NLRA. *See* 29 U.S.C. § 187(a). Section 8(b)(4) of the NLRA nakes it an "unfair labor practice" for a labor organiza- ion to engage in, or to induce any individual to engage in, strike, where an object thereof is to force any person to :ease doing business with any other person or to force an :mployer to recognize or bargain with a labor organiza- ion not certified as the representative of the employer's :mployees. *See* 29 U.S.C. § 158(b)(4)(i)(B). Section 303(b) of the LMRA provides that any person injured in his business or property" by virtue of a Section 303(a) iolation "shall recover the damages by him sustained and he cost of the suit." *See* 29 U.S.C. § 187(b). The LMRA s silent on the subject of prejudgment interest.

The Law of Prejudgment Interest

Since the early part of this century, the United States Supreme Court has stated repeatedly that discretionary wards of prejudgment interest are permissible under fed- ral law in certain circumstances. Under the Court's anal- sis, the award should be a function of (i) the need to ully compensate the wronged party for actual damages uffered, (ii) considerations of fairness and the relative quities of the award, (iii) the remedial purpose of the tatute involved, and/or (iv) such other general principles s are deemed relevant by the court. *See Loeffler v. Frank*, 86 U.S. 549, 557-58 (1988); *Blau v. Lehman*, 368 U.S.

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403, 414 (1962); *Rodgers v. United States*, 332 U.S. 371 373-74 (1947); *Board of County Comm'rs of the Count of Jackson v. United States*, 308 U.S. 343, 352 (1939) *Miller v. Robertson*, 266 U.S. 243, 257-58 (1924).

On the basis of one or more of these enumerated con siderations, the Court has allowed recovery of prejudg ment interest under a variety of federal laws, despite th silence of the laws on the subject of interest. *See, e.g Loeffler*, 486 U.S. at 557-58 (suit for back pay under Titl VII); *Jacobs v. United States*, 290 U.S. 13, 16-17 (1933 (suit under takings clause of Fifth Amendment; interes viewed as part of "just compensation"); *Waite v. Unite States*, 282 U.S. 508, 509 (1931) (patent law infringemer suit; interest viewed as part of "entire compensation" t which statute referred); *Miller*, 266 U.S. at 250, 258 (con tract suit under Trading With the Enemy Act); *Seaboar Air Line Ry. Co. v. United States*, 261 U.S. 299, 302, 304 06 (1923) (suit for taking of property under the Lever Act interest viewed as part of "just compensation" to whic statute referred); *Billings v. United States*, 232 U.S 261, 284-88 (1914) (suit to recover federal excise taxe paid).

The Court has, however, disallowed prejudgment inter est awards in certain instances. Prejudgment interest ma not be awarded, of course, when Congressional intent i to the contrary. Intent to deny recovery of prejudgmer interest may be obvious from the language of the statut itself. *See United States v. Goltra*, 312 U.S. 203, 207, 21 (1941) (statute governing plaintiff's claim against th United States provided no interest until "rendition o judgment"). Even when the statute is silent, intent to den recovery of interest may be inferable from (i) the state o the law on prejudgment interest, for the type of clair involved, at the time the statute was passed, and (ii) con

sistent denial by the courts of prejudgment interest under the statute and failure by Congress, despite amendments to the statute, to address prejudgment interest awards. *See Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 336-39 (1988) (denying prejudgment interest under Federal Employers' Liability Act).

Awards of prejudgment interest must not result in overcompensation of the plaintiff. Accordingly, the Court has suggested disapproval of such awards where the statute itself fixes damages deemed fully compensatory as a matter of law. *See Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 699, 714-16 (1945) (interest not recoverable on liquidated damages provided by Fair Labor Standards Act of 1938). Similarly, prejudgment interest should not be awarded if the statutory obligation on which interest is sought is punitive in nature. *See Rodgers*, 332 U.S. at 374-76 (interest not recoverable on penalty imposed on farmer for exceeding quota under Agricultural Adjustment Act); *United States v. Childs*, 266 U.S. 304, 308-10 (1924) (interest recoverable on back taxes due, but not on penalty assessed for nonpayment).

The relative equities may make prejudgment interest inappropriate when the defendant acted innocently and had no reason to know of the wrongfulness of his actions, *see Jackson County*, 308 U.S. at 352–53; when there is a good faith dispute between the parties as to the existence of any liability, *see St. Louis & O'Fallon Ry. Co. v. United States*, 279 U.S. 461, 478, 483 (1929) (suit under Interstate Commerce Act to recover excess income allegedly earned); or when the plaintiff himself is responsible for the delay in recovery, *see Redfield v. Bartels*, 139 U.S. 694, 695, 702-03 (1891) (suit to recover duties wrongfully imposed; interest denied since plaintiff neglected bringing suit for years).

Our prejudgment interest decisions have been in accord with the Supreme Court's approach. We have allowed discretionary awards of prejudgment interest, notwithstanding the statute's silence on the subject of interest, when the awards were fair, equitable and necessary to compensate the wronged party fully. *See, e.g., EEOC v. County of Erie*, 751 F.2d 79, 81 (2d Cir. 1984) (award under Fair Labor Standards Act and Equal Pay Act) (citing *Rodgers v. United States*, 332 U.S. 371, 373 (1947)); *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir.) (award for breach of fiduciary duties by pension fund trustees under Employee Retirement and Income Security Act), *cert. denied*, 469 U.S. 1072 (1984); *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 153-54 (2d Cir. 1984) (foreign arbitral award under 9 U.S.C. § 207); *Mitsui & Co. v. American Export Lines, Inc.*, 636 F.2d 807, 823, 824 (2d Cir. 1981) (award under the Carriage of Goods by Sea Act) (citing *Miller v. Robertson*, 266 U.S. 243, 258 (1924)); *Rolf v. Blyth, Eastman Dillon & Co.*, 637 F.2d 77, 86-87 (2d Cir. 1980) (award under section 10(b) of the Securities Exchange Act of 1934) (citing *Blau v. Lehman*, 368 U.S. 403, 414 (1962)); *see also International Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 446-47 (2d Cir. 1975) (award in contract action brought under Section 301 of the LMRA), *cert. denied*, 429 U.S. 825 (1976).

By contrast, we have suggested that prejudgment interest is improper where the statute itself already provides for full compensation or punitive damages, *see Trans World Airlines, Inc. v. Hughes*, 449 F.2d 51, 80 (2d Cir. 1971) (treble and punitive damages available under antitrust laws), *rev'd on other grounds*, 409 U.S. 363 (1973); *United States v. Foster Wheeler Corp.*, 447 F.2d 100, 102 (2d Cir. 1971) (double damages available under

False Claims Act); or where tradition or the language of the statute makes the award inappropriate, *see Gretchen v. United States*, 618 F.2d 177, 178 & n.2 (2d Cir. 1980) (Public Vessels Act failed to provide interest until "rendition of judgment"); *Gilroy v. Erie-Lackawanna R.R. Co.*, 44 F.R.D. 3, 4 (S.D.N.Y. 1968) (prejudgment interest "traditionally" not awarded on claims under Federal Employers' Liability Act).

The certainty of the damages due the plaintiff has been another factor in resolving prejudgment interest issues. The Supreme Court initially embraced the strict common law view that interest may not be recovered where damages are unliquidated, or difficult to ascertain with precision at the time of the alleged wrongdoing. *See, e.g., Mowry v. Whitney*, 81 U.S. (14 Wall.) 620, 653 (1872) (denying prejudgment interest in patent law infringement action). Accordingly, prejudgment interest originally was available only in contract actions, if at all. The reasoning of the common law was that interest would be unjust if the party committing the wrongdoing could not know exactly how much to tender to the wronged party to make the latter whole.

Even in the modern cases awarding prejudgment interest, damages have been ascertainable with precision, at least by the time of trial or judgment. For instance, the amount of back pay due an employee or the losses incurred in a fraudulent securities transaction could be calculated with certainty in many cases by the finder of fact, after consideration of the available information. However, the significant feature of these same cases was that no party could foresee, at the time of the wrongdoing, the full amount of damages that would result. The difficulty of computing a "make whole" amount frequently persisted until judgment itself. In an employment case,

nobody knows on the date of the wrongful termination the amount of back pay that will be necessary to make the plaintiff whole. The quantity can only be determined at trial, on the date verdict is rendered, and is therefore not "liquidated" in the common law sense. *See Greenberg v. Paramount Pictures, Inc.*, 85 F.2d 42, 45 (2d Cir. 1936) (L. Hand, J.). These problems of calculation also exist in cases in which the injury is more similar to Wickham's. In a securities fraud case, for example, no one knows on the date of the deception how much loss there will be in the value of the stock, or what the stock's price will be on the date suit is brought. Similarly, in a patent infringement case, it is impossible to determine at the time of infringement the profits that will be lost by one party or gained by the other. Yet, prejudgment interest awards have been upheld frequently in these and analogous cases, both by the Supreme Court and by this Court.

Accordingly, the old common law rule of liquidated damages no longer retains its full vitality. The Supreme Court has practically said as much, *see Miller*, 266 U.S. at 258; *see also Funkhouser v. J.B. Preston Co.*, 290 U.S. 163, 168-69 (1933), as have we, *see United Aircraft*, 534 F.2d at 447; *see also Greenberg*, 85 F.2d at 45, as has at least one other circuit, *see Eazor Express, Inc. v. International Bhd. of Teamsters*, 520 F.2d 951, 973 (3d Cir. 1975) (citing *Miller*, 266 U.S. at 258), *cert. denied*, 424 U.S. 935 (1976). Moreover, the current "equitable" and discretionary rule, based on the need for full compensation and fairness under the circumstances, necessarily rejects much of the common law's approach to prejudgment interest.

The speculative nature of the damages in question will always be relevant to a sound decision on a consideration of whether prejudgment interest should be awarded. How-

ever, the proper inquiry must include the other factors we have identified: analysis of the pertinent statute and its purposes; the need to fully compensate the injured party; fairness and the relative equities; and the specific circumstances of the parties and of the case. The degree of speculation must then be considered in light of these other factors to determine the propriety of prejudgment interest. We recognize that in some Section 303 actions the fact finder's calculation of losses suffered by the employer will be so conjectural that prejudgment interest should not be awarded. Nonetheless, while the presence of "abstruse inquiries" and "difficult questions of proof" in the calculation of damages are factors to be considered carefully, these problems must be considered together with other factors that may favor prejudgment interest. *See Hughes*, 449 F.2d at 80.

For the foregoing reasons, we cannot agree with the union that the silence of the LMRA on the subject of interest, or the unliquidated nature of damages in a Section 303 case, are sufficient without more to bar the award made to Wickham.

II. The Award of Interest Against the Union

The factors generally justifying an award of interest are present in this case. Wickham clearly suffered actual damage to its business because of the secondary strike. The union insists that Wickham's work on the schools was interrupted for only the two week period during which the Board of Education stop orders were outstanding, not for the two month period of the strike. There is some indication in the record, however, that the disruption in this case lasted for two months, from early July 1974 until early September 1974, when the strike was enjoined by a federal district court. *See Wickham I*, 542 F.2d at 862;

Wickham II, 715 F.2d at 23, 24. In any event, the disruptions and delays, whether of two weeks or two months, were of real impact. The stop orders issued by the Board of Education directed Wickham to remove all of its men and materials from the school construction sites. Initial compliance with the orders alone disrupted labor and supply schedules. Each of the three contracts had a duration of less than a calendar year, and we cannot say that a two week stoppage, in the context of the construction business in which Wickham is engaged, failed to cause further problems. The district court found that because of the delays, Wickham had to perform certain of its work while the schools were in session, and that the projects were more costly to complete as a result. There is nothing in the record to the contrary. *See also Wickham II*, 715 F.2d at 25. It is reasonable to believe (as the jury appears to have believed on the basis of the evidence presented) that the disruptions and delays caused by the strike eroded Wickham's expected profits from the contracts, by increasing overhead and supply costs and making Wickham's use of labor and resources less efficient than would have otherwise been the case.

Hence, Wickham was deprived of money that it otherwise would have earned but for the secondary strike. As Judge Mukasey pointed out, the damage was incurred by Wickham on September 1, 1975, the date on which Wickham was to have received payment under the original schedule contemplated by the contracts. Therefore, Wickham has been deprived of a sum owed to it, under Section 303 of the LMRA, for over 16 years. It was not an abuse of discretion for the district court to determine that prejudgment interest was necessary to compensate Wickham fairly under the circumstances, especially in view of high

inflation during several of those years. *See Rolf v. Blyth, Eastman Dillon & Co.*, 637 F.2d 77, 87 (2d Cir. 1980).

Further, as indicated by the language of Section 303(b), the purpose of the civil remedy provided by that provision is compensatory and remedial. *See Local 20, Teamsters, Chauffeurs and Helpers Union v. Morton*, 377 U.S. 252, 260-61 (1964). Under the circumstances of this case, an award of prejudgment interest comports with the remedial scheme of the statute. By contrast, the factors that have led federal courts to deny prejudgment interest awards are markedly absent in this case.

There is no indication that Congress intended to deny recovery of prejudgment interest in Section 303 cases. In *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330 (1988), a case involving a personal injury suit by a railroad employee, the Supreme Court concluded that prejudgment interest awards under FELA were contrary to the intent of Congress. The Court reached this conclusion because (i) in 1908, at the time FELA was passed, the common law rule barring recovery of interest in tort actions was still in force, and (ii) a great many state and federal courts had concluded with "virtual unanimity" over the years since the passage of FELA that prejudgment interest should not be available under the statute. *See id.* at 337–39. The Court held that under these circumstances, intent to deny interest recovery could be inferred from both the original silence of Congress on the subject of prejudgment interest, and Congress' failure, despite many amendments to FELA, to make any additions on the subject to the statute in the face of unanimous court holdings denying interest. *See id.*

There is no similar indication that Congress intended to deny recovery of prejudgment interest in actions under

Section 303 of the LMRA. The legislative history of the LMRA is as silent as that of FELA on the subject of prejudgment interest. However, the LMRA was passed in 1947, well after the passage of FELA. By the 1940s, the common law rule against prejudgment interest in cases of unliquidated damages and tort actions had eroded severely, and was supplanted by an equitable and discretionary approach emphasizing compensation. *See Prager v. New Jersey Fidelity and Plate Glass Ins. Co.*, 245 N.Y. 1, 5-6 (1927) (Cardozo, C.J.) (noting that in cases involving prejudgment interest considerations of "policy and justice" frequently controlled, and that interest may be necessary to make plaintiff whole); *see also Greenberg v. Paramount Pictures*, 85 F.2d 42, 45 (2d Cir. 1936) (L. Hand, J.).

Prejudgment interest in personal injury cases similar to those covered by FELA has not become accepted even to this day. By contrast, awards of prejudgment interest, without inquiry into the certainty of the losses suffered at the time of the wrongdoing, were acceptable well before the passage of the LMRA in tort cases involving injury to property or business. *See Flamm v. Noble*, 296 N.Y. 262, 267-68 (1947) (citing *McCormick v. Pennsylvania Cent. R.R. Co.*, 49 N.Y. 303 (1872); *Parrot v. Knickerbocker Ice Co.*, 46 N.Y. 361 (1871); *Andrews v. Durant*, 18 N.Y. 496 (1859)). Moreover, the Supreme Court itself decided *Miller* in 1924, *Waite* in 1931, *Funkhouser* in 1933, and *Jackson County* in 1939, all well before passage of the LMRA. The *Rodgers* decision was handed down in 1947, the very year the LMRA was passed. The Court's language in these cases strongly suggested an abandonment of the common law approach to prejudgment interest under federal statutes, and endorsement of a more discretionary approach.

Unlike the plethora of courts that have rejected recovery of prejudgment interest under FELA, only a relatively small number of courts have considered directly the issue of prejudgment interest under Section 303 of the LMRA. Of the courts that have considered the issue, few have expressed the hostility to prejudgment interest we perceive in the FELA cases. Moreover, the long history of denial of prejudgment interest in the FELA cases, and emphasized in *Monessen*, is wholly absent in the context of the LMRA.

The Eighth Circuit has disallowed prejudgment interest in a Section 303 case, apparently on common law reasoning that damages in a Section 303 action are by definition unliquidated. *See Noranda Aluminum, Inc. v. United Bhd. of Carpenters and Joiners*, 528 F.2d 1304, 1310 (8th Cir.), *cert. denied*, 429 U.S. 835 (1976). This strict approach appears to have been followed once in the District of Massachusetts, without discussion of the matter by the First Circuit on appeal. *See John B. Cruz Const. Co. v. United Bhd. of Carpenters and Joiners*, No. 84-2041MC, 1989 WL 63680 (D. Mass. 1989), *aff'd* 907 F.2d 1228 (1st Cir. 1990). On the other hand, prejudgment interest in Section 303 suits has been awarded (with neither discussion on the merits nor reversal by the court of appeals) in the District of Massachusetts, *see Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 814 F.2d 32 (1st Cir.), *cert. denied*, 484 U.S. 820 (1987); in the Western District of Pennsylvania, *see C&K Coal Co. v. United Mine Workers of Am.*, 537 F. Supp. 480 (W.D. Pa. 1982), *aff'd and rev'd in part on other grounds*, 704 F.2d 690 (3d Cir. 1983); and in the Southern District of Mississippi, *see Gulf Coast Bldg. & Supply Co. v. International Bhd. of Elec. Workers*, 460 F.2d 105 (5th Cir. 1972).

While the Third Circuit has set aside a prejudgment interest award under Section 303, we find it significant that the court did not apply a *per se* rule against the award. Rather, the court applied an equitable rule similar to the one we have discussed here, and decided that on the particular facts of that case no unjust enrichment meriting interest compensation existed. *See Feather v. United Mine Workers of Am.*, 711 F.2d 530, 540-41 (3d Cir. 1983). Similarly, in an opinion remanding a Section 303 case to the Eastern District of Wisconsin with guidelines for recomputation of damages, the Seventh Circuit passed over without adverse comment the district court's award of prejudgment interest on the original amount of damages calculated. *See Boxhorn's Big Muskego Gun Club v. Electrical Workers Local 494*, 798 F.2d 1016, 1022-23 (7th Cir. 1986). We note also that the Third Circuit has upheld an award of interest in a dispute under Section 301 of the LMRA for breach of contract. *See Eazor Express, Inc. v. International Bhd. of Teamsters*, 520 F.2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976). Likewise, we reversed and remanded a district court decision not to grant interest in a Section 301 action, noting that such a grant might have been entirely appropriate under the circumstances. *See United Aircraft*, 534 F.2d at 446-47.

The LMRA does not fix liquidated damages, and does not double or treble damages. Nor is a Section 303(b) award punitive in nature. Therefore, the interest award to Wickham is not overly compensatory or otherwise improper. Moreover, there is no basis in the history of the dispute between Wickham and the union for concluding that the union acted innocently or that the union's actions against Wickham were taken in good faith. While there are cases in which it is difficult to determine whether an unlawful secondary strike has occurred, this is not one of

those cases There is every indication in this case that the union knew it was clearly violating a specific statutory duty erected by the LMRA. *See Wickham I*, 542 F.2d at 863, 865-67. Moreover, as we observed shortly after the strike, the union's coercive attempt to oust the Teamsters as bargaining representative of Wickham's employees itself was of "dubious legality," and a "fundamental abuse" of the responsibilities of a labor organization. *See id.* at 865, 867.

The availability of both injunctive and monetary relief under the labor laws for secondary strikes reflects a strong national policy against behavior Congress found quite objectionable. *See* Robert A. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 291 (1976). The policy is rooted in the desire to protect innocent third parties from labor disputes. In this case, the union's unlawful activity led to the disruption of public schools. These observations are offered not to suggest in any way that the union deserves to be penalized by an award of prejudgment interest, but rather to emphasize that the award does not strike us as inequitable under the circumstances.

We do not agree with the union that the Supreme Court's decision in *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539 (1988), militates against an award of interest in this case. *Laborers Health* did not even address the question of prejudgment interest, but rather involved a jurisdictional question arising under ERISA. While the Court did state in dicta that prejudgment interest awards become "problematic" in labor cases where there is a "good-faith dispute over both the existence and the extent of the employer's liability," the Court also noted that "it is entirely appropriate to award prejudgment interest" when

a specific contractual provision is breached. *See id.* a 551-52. As we have said, it is improbable that the union's actions toward Wickham were taken in good faith; and, in any event, whatever doubts there may have been as to the exact amount of the union's liability, there has been little doubt for years that the union breached a specific duty imposed by the LMRA. In *Laborers Health*, by contrast the employer simply ceased to make contributions to a pension plan after the contract obligating him to do so had expired. *See id.* at 542. That is a far cry from what went on here.

The union further contends that, although a jury determined that the union was civilly liable to Wickham in 1982, the extent of that liability was not established until 1991 and therefore it would be unfair for interest to accrue prior to that time. We disagree. It was entirely appropriate for Judge Mukasey to choose the date of injury as the date on which prejudgment interest should begin to accrue. *See Taliercio v. Compania Empressa Lineas Argentina*, 761 F.2d 126, 129 (2d Cir. 1985). It is also worth recalling that in 1975, both the NLRB and this Court determined that a "secondary boycott"—the basis of civil liability under Section 303—had occurred. While these determinations had no res judicata effect on the civil suit as such, they did provide early notice of potential civil liability.

The district court also determined that the long delay in obtaining judgment on the amount of damages was due essentially to procedural matters beyond Wickham's control. The record does not suggest that this determination is clearly erroneous, and we are not in a position to reexamine *de novo* the 17 year procedural history of this dispute. Moreover, it is undisputed that Wickham promptly commenced its Section 303(b) suit in 1974. Accordingly

we see no basis for reversing the interest award on grounds of delay by the plaintiff.

Lastly, the damages suffered by Wickham in this case were not so conjectural that an award of prejudgment interest was an abuse of discretion under the circumstances. The total revenue to be earned by Wickham under the three contracts was known with certainty to be $502,000. Further, as an experienced contractor, Wickham probably had a good idea of the expected cost of labor and materials. The trial testimony of Biele, Wickham's President, was that Wickham expected a 10% profit. We realize that Biele could not recall where this figure came from, but note that the same profit margin is given in a 1974 letter from Wickham to the Board of Education. The letter was an exhibit at trial. Further, as we noted in our earlier decision remanding this case for a new trial on damages, only the work stoppage could provide a legal basis for recovery under Section 303(b), since no evidence existed linking the union's activities to the various other misfortunes that Wickham suffered at the time. *See Wickham II*, 715 F.2d at 25, 28–29.

Therefore, the upper limit on damages could be calculated with some certainty at about $50,200, the total profits expected under the three contracts. The jury's task was relatively discrete: to determine how much of this expected profit was eroded due to the work stoppage, or, as Judge Mukasey put it in his instructions, to determine what Wickham "would have earned less the amount [Wickham] actually earned."

According to the union, the jury declined to engage in such calculations and instead speculated as to damages by awarding Wickham "precisely" 10% of lost profits on only two contracts, those governing the work at P.S. 8 and

P.S. 41. The union also contends, coincidentally, that Wickham's work was disrupted only at these two schools because workers were not present at the Tremont Early Childhood Center on the day the Board of Education stop orders were issued. The record leaves us unconvinced of either contention. The total price of the P.S. 8 and P.S. 41 contracts was $406,000. Lost profits on these contracts would have been $40,600, not $41,000.

It is possible that the jury did that which the union contends, but simply rounded upwards. Yet Wickham has maintained all along that work was disrupted at Tremont as well, and for 15 years the facts of this case have suggested that all projects were affected. *See Wickham I*, 542 F.2d at 862; *Wickham II*, 715 F.2d at 23. Even if nobody were present at the Tremont site the day the stop orders were issued, it is hardly unreasonable to believe that the terms of the stop orders prevented people from returning to the Tremont site, or otherwise disrupted the Tremont project.

Therefore, it is equally possible that the jury began with $50,200 expected profit for all three contracts, and then made a determination that about 80% of this sum was lost by Wickham due to increased costs and lost efficiencies. This determination does not strike us unreasonable or unduly speculative on the basis of the evidence presented at trial. In this connection, we note that the union has appealed neither Judge Mukasey's evidentiary rulings nor the amount of the jury's award.

We have carefully considered the union's remaining arguments, and find them to be without merit.

CONCLUSION

The judgment of the district court awarding prejudgment interest under Section 303(b) of the LMRA is affirmed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WICKHAM CONTRACTING CO., INC. and RALPH PERONE, as a Joint Venture,

Plaintiffs,

- against -

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Defendant.

OPINION AND ORDER

MICHAEL B. MUKASEY, U.S.J.D.

This brief opinion is occasioned by the parties' dispute as to whether plaintiffs, which were awarded $41,000 by a jury as damages resulting from defendant's unlawful secondary boycott, should receive prejudgment interest. This is no small matter in this case because, as the docket number of the case suggests, the underlying facts occurred about 17 years ago.

Defendant's counsel asserts in a letter to the court dated April 29, 1991 that an award of prejudgment interest was proposed by the court sua sponte, and that it is "hornbook law that absent legislative authorization ... a Court may award prejudgment interest only when the damages recovered were liquidated...." Neither assertion is correct. Plaintiffs raised the issue of prejudgment interest, and the correct statement of the law is that prejudgment interest is mandatory when the amount is liquidated, but otherwise is within the discretion of the court guided by "fundamental considerations of fairness." Rolf v. Blyth, Eastman Dillon & Co., Inc., 637 F.2d 77, 87 (2d Cir. 1980).

Those considerations warrant an award of prejudgment interest here. Defendant's violations of the labor laws was clear and liability was deter-

mined long ago. The jury's award was small and recognized the added costs to plaintiff and its losses that resulted from having to do added work on the projects affected by defendant's conduct, and to do work while school was open instead of while school was in recess, under radically different conditions from those anticipated when plaintiffs bid on the renovation contracts in question. The delay in adjudicating damages is not attributable to plaintiffs but rather is due to the tortured procedural history of this case, which was assigned to my docket in 1989. Plaintiffs have been deprived of the use of the funds since the time of the events in question.

Plaintiffs have submitted a judgment calling for interest from July 22, 1974, the date plaintiffs were directed to stop work on the projects affected by defendant's wrongful acts. A more

appropriate date would appear to be the date by which plaintiffs could have expected to be paid for their work. Although the record does not reflect a precise date when such payment would have been made, it does reflect that plaintiffs continued work well into the 1974-75 school year. Accordingly, interest will be awarded from September 1, 1975. Settle judgment accordingly on five days' notice following the date when plaintiffs' counsel returns to his office.

SO ORDERED:

/s/ MICHAEL B. MUKASEY

Michael B. Mukasey
U. S.District Judge

DATED: New York, New York
May 14, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WICKHAM CONTRACTING CO., INC. and RALPH PERONE, as a Joint Venture,

Plaintiffs,

- against -

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Defendants.

JUDGMENT

74 Civ. 3248 (MBM)

The above-entitled action having come on for trial before the Hon. Michael Mukasey and a jury of six in the United States District Court for the Southern District of New York, commencing on April 16, 1991 and concluding on April 22, 1991, and the plaintiffs having appeared by their attorney, Joseph E. Gulmi, and the defendant having appeared by its attorney, Norman Rothfeld, and the allegations and proofs herein having been heard by a jury of six and due deli-

beration having been had and the jury having duly rendered a unanimous verdict in favor of the plaintiffs on April 23, 1991, in the sum of $41,000 against the defendant, and this Court in its Opinion and Order having awarded to the plaintiff prejudgment interest from September 1, 1974,

Now, on motion of Norman Rothfeld, attorney for the defendant, it is

ORDERED, ADJUDGED AND DECREED, that the plaintiffs, Wickham Contracting Co., Inc. and Ralph Person, as a Joint Venture, located at 415 Fifth Avenue, Pelham, New York, have a judgment against the defendant, Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, located at 158-11 Harry Van Arsdale Jr. Avenue, Flushing, New York, in the sum of $91,905, together with the costs and necessary disbursements of this action, to be taxed by the Clerk of this Court,

and that plaintiffs have execution therefor, which execution is stayed for a period of thirty (30) days from the date of this judgment.

Dated: New York, New York
May 30, 1991

/s/ MICHAEL B. MUKASEY

UNITED STATES DISTRICT JUDGE

THIS DOCUMENT WAS ENTERED ON June 3, 1991

STATUTES

Pertinent text of 29 U.S.C. §187:

> SEC. 303. (a) It shall be unlawful...for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.
>
> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States...and shall recover the damages by him sustained and the cost of the suit.